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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. ——

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of David H. Blair, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above case on June 1, 1925, affirming the judgment of the Supreme Court of the District of Columbia.

QUESTIONS PRESENTED

I

Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of section 1324 (a) of the Revenue Act of 1921?

II

What is the date of the "allowance of a claim for the refund of or credit for internal revenue taxes paid" within the meaning of section 1324 (a) of the Revenue Act of 1921?

STATEMENT

This case arose out of the allowance by the Commissioner of Internal Revenue of respondents' claim for a refund of $35,054.85 overpaid income taxes for the year 1919.

The Government contends that the date of the allowance of this refund was May 19, 1924, the date on which the Commissioner signed a schedule of overassessments and allowance of abatements, credits, and refunds, and that therefore interest was payable only up to that date computed from November 18, 1923 (six months after the filing of claim for refund), in accordance with the provisions of Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 227, ch. 136); whereas respondents contend that the refund was not allowed until August 12, 1924, the date on which the Commissioner signed an authorization to the Disbursing Clerk of the Treasury Department directing payment of the refund and that interest thereon was payable up to that date computed from the date the tax erroneously collected was paid, in accordance with Section 1019 of the Revenue Act of 1924 (43 Stat. 253, ch. 234).

Upon petition for a writ of mandamus the Supreme Court of the District of Columbia sustained the contention of the respondents, which judgment was affirmed by the Court of Appeals of the District of Columbia.

For the language of the statutes involved and a more detailed statement of the facts, reference is made to the supporting brief included herein.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals has misconstrued the meaning of the word "allowance" as used in Section 1324 (a) of the Revenue Act of 1921.

2. The court's construction of the word "allowance" overrules the settled practice of the Treasury Department, not only with respect to the allowance of *claims* for refunds duly filed by taxpayers but also in the matter of the application of the period of limitation for the *voluntary* refund of erroneously collected taxes fixed by Section 252 of the Revenue Acts of 1918 (40 Stat. 1057, ch. 18) and 1921 (42 Stat. 227, ch. 136) and Section 281 of the Revenue Act of 1924 (43 Stat. 253, ch. 234).

3. The case is one of great public importance and of great importance to the Government in the administration of the revenue laws, for the reason that it affects every refund made by the Treasury Department of internal-revenue taxes.

4. The decision of the Court of Appeals is not in harmony with the rulings of this Court with

respect to the allowance of interest against the Government. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251; *United States* v. *New York*, 160 U. S. 598.

5. Under the decision of the Court of Appeals thousands of interest payments on claims for refund will have to be adjusted, involving the payment of approximately $6,000,000. In addition, it will be necessary to pay out of the Treasury an indefinite amount to cover claims which may be filed in the future.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

AUGUST, 1925.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below have not yet been reported. However, the opinion of the Supreme Court of the District of Columbia will be found on page 12 of the transcript of record and the opinion of the Court of Appeals of the District of Columbia on page 16 thereof.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on June 1, 1925. **(R. 19.)**

No question of jurisdiction was raised in the courts below.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, ch. 229).

STATEMENT OF FACTS

In the year 1920 one Margaret Murphy, subsequently deceased, paid, without protest, to the Collector of Internal Revenue at Philadelphia the sum of $88,956.92 as her income tax for the year 1919. (R. 1, 2.) Later, on May 18, 1923, a claim was filed with the Commissioner of Internal Revenue for a refund of $35,054.85, alleged to be an overpayment of taxes for 1919. (R. 7.) This claim was duly examined, and on May 19, 1924, the Commissioner of Internal Revenue, in accordance with the provisions of Section 1324 (a) of the Revenue Act of 1921, signed a schedule of overassessment and allowance of abatement, credit and refund in the amount claimed by respondents, and gave certain instructions to the Collector of Internal Revenue for the First District of Pennsylvania with respect thereto. (R. 8.) The Collector relisted the amount of the refund on a subsidiary schedule known as a schedule of refunds and credits, with the statement, signed June 30, 1924, that—

> The items hereon are relisted as they appeared for refund or credit on an original schedule of overassessments and related

> claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit. (R. 8., Exhibit A, at p. 10 of Record.)

On August 12, 1924, the Commissioner signed an authorization to the Disbursing Clerk of the Treasury Department directing him to pay a refund to respondents in the sum of $35,054.85, together with interest amounting to $1,057.41, with the instruction that interest was to be computed from November 18, 1923 (six months after the filing of the claim for refund), to May 19, 1924, the date on which the Commissioner made the allowance aforesaid. (R. 8, Exhibit A.) On August 25, 1924, a check for the amount of the refund plus interest computed in accordance with the Commissioner's instructions was mailed to respondents and subsequently cashed. Respondents, however, protested the amount of interest allowed and demanded that it be computed from the dates of the respective quarterly payments made by the decedent in 1920 to August 12, 1924, the date upon which the Commissioner signed the authorization to the Disbursing Clerk for payment. (R. 2, 8.)

Upon the refusal of the Commissioner of Internal Revenue to accede to the demand for addi-

tional interest, the respondents petitioned the Supreme Court of the District of Columbia for a writ of mandamus to compel the Commissioner to compute and allow interest on the amount of the refund at 6 per cent per annum from the respective dates of the quarterly instalments to August 12, 1924, and to authorize and direct the proper disbursing officer to pay to the respondents the amount by which the sum of such interest exceeded $1,057.41, the amount of interest theretofore received. Petitioner filed an answer, to which respondents demurred. On January 2, 1925, the Supreme Court of the District of Columbia sustained this demurrer (R. 12), and upon appeal (R. 13) the Court of Appeals of the District of Columbia, on June 1, 1925, sustained the judgment of the Supreme Court of the District of Columbia (R. 19), modifying the same to the extent that interest should be computed only to August 12, 1924, and holding that the Act of 1924 applied instead of the Act of 1921.

STATUTES INVOLVED

Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 227, ch. 136) provides:

> That upon the allowance of a claim for the refund of or credit for internal-revenue taxes paid interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such alowance, as follows: (1) If such amount was paid under

> a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

This section of the Revenue Act of 1921 was specifically repealed by Section 1100 (a) of the Revenue Act approved June 2, 1924 (43 Stat. 253, ch. 234). The latter Act, in Section 1019, with respect to the same subject matter, provides:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the

assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

SPECIFICATION OF ERRORS TO BE URGED

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the decision of the Court of Appeals of the District of Columbia are:

1. The court erred in holding that mandamus lies to compel the Commissioner of Internal Revenue to compute additional interest under the provisions of Section 1324 (a) of the Revenue Act of 1921, relating to the allowance of interest on a refund of taxes erroneously collected.

2. The court erred in failing to hold that the construction placed upon Section 1324 (a) of the Revenue Act of 1921 by petitioner was a reasonable one and within the discretion reposed in him by law.

3. The court erred in holding that respondents are entitled to interest from the dates of the payments of the quarterly instalments of the decedent's 1919 tax.

4. The court erred in failing to hold that the approval by petitioner on May 19, 1924, of the schedule of assessments and allowance of abatements, credits, and refunds was the allowance of respondents' claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

ARGUMENT

I

The action of the Commissioner of Internal Revenue in allowing interest on claims for refund is in the exercise of his judgment and discretion, and is not reviewable by the courts in a mandamus proceeding

The rules respecting the extent to which the action of an executive officer will be controlled by a writ of mandamus are well settled. The rule is that if the question is one necessitating the construction of statutes in order for the officer to decide the course of action to be pursued, judgment and discretion are involved and the courts will refuse to interfere by mandamus. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *United States ex rel. Hall* v. *Payne*, 254 U. S. 343.

Such is the case here. Section 1324 (a) of the Revenue Act of 1921, *supra*, provides that interest shall be allowed upon the total amount of an allowance by the Commissioner of Internal Revenue of a claim for refund or credit to the date of such allowance. When this provision is read, as it must be, in connection with the various steps necessarily involved in the departmental procedure relating to the refunding of taxes erroneously collected, it is obvious that the statute required construction by the Commissioner before it could be administered. As stated in *United States ex rel. Hall* v. *Payne*, *supra* (p. 347):

> It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. * * * He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

The cases of *Roberts* v. *United States,* 176 U. S. 221; *Lane* v. *Hoglund,* 244 U. S. 174; and *Work* v. *McAlester, Etc., Co.,* 262 U. S. 200, relied upon by the Court of Appeals, are not in point. They each involved statutes the construction of which was hardly open to debate. The Court was very careful to emphasize this fact. Thus, in the *Hoglund* case the Court said, speaking of the statute (p. 181):

> We think it *certainly* and *unmistakably* lays upon the Secretary of the Interior * * * a *plain* duty. * * * [Italics ours.]

Here the case is quite different. The statute involved clearly required construction before it could be given operation.

A further reason why the court below should have dismissed the petition for a writ of mandamus is that under the principle of *Crozier* v. *Krupp*, 224 U. S. 290, it would seem that petitioners have an adequate remedy by suit in the Court of Claims.

II

Within the meaning of section 1324 (a) the commissioner allowed the claim for refund on May 19, 1924

Petitioner's case might well rest here, but, conceding for the sake of argument that mandamus does lie, still respondents should not prevail.

Section 1324 (a) provides:

> That upon the allowance of a claim for the refund of or credit for internal-revenue tax paid interest shall be allowed * * * and paid upon the total amount of such refund or credit to the date of *such allowance.* * * * [Italics ours.]

As here used, the term "such allowance" manifestly can only have reference to the date upon which the Commissioner, after due examination, formally decides that the claimant is entitled to a refund or credit. Such is the sense in which the word "allow" is commonly understood. Thus, in *Marshall* v. *Franklin Fire Insurance Company of Philadelphia*, 176 Pa. State 628, following the definition of well-recognized dictionaries, the Supreme Court of Pennsylvania says (p. 636):

> This word is ordinarily equivalent to the word "permit" or to the words "consent

> to." Its use in any given case assumes the existence of a power to refuse to allow, permit, or consent to and the right to elect whether to grant or withhold the allowance or permission asked for.

So, in the instant case, the Commissioner "allowed" the claim for refund on May 19, 1924, by indicating his approval thereof by signing on that date the schedule which read:

> The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto. (Exhibit A of Record.)

Consequently, all subsequent actions by the Commissioner, such for instance as receiving a report from the Collector or signing a later schedule, amount and can amount to nothing more than subsequent steps in the procedure essential to procuring payment by a different bureau of the Government. The fact that claimant is entitled to a refund or credit, and the amount thereof, is determined and fixed when the Commissioner signs the first schedule. Thereafter it is only a routine matter to determine how much the claimant shall receive in cash and how much by way of credit. Whether the allowance is liquidated in whole by credit or in whole by cash or partly by credit and

partly by cash, the total of principal and interest received by claimant is the same, and the date of allowance remains the date of the approval of the original schedule. To compute interest after that date would be to pay interest *beyond* instead of "*to* the date of such allowance." This practice, which has always been followed, is in exact conformity with the language of the law and is within the rule established by numerous decisions of this Court that interest is not to be allowed against the Government except where there is an express agreement to pay or clear statutory authority therefor. *United States* v. *Sherman*, 98 U. S. 567; *Angarica* v. *Bayard*, 127 U. S. 260; *United States* v. *New York*, 160 U. S. 619.

CONCLUSION

In view of the fact that the question here involved is of great importance in the practical administration of the revenue laws, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Attorney.

AUGUST, 1925.